92-1549

Supreme Court, U.S.
FILED
MAR 2 3 1993
OFFICE OF THE CLERK

NO. 92 - _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CONNIE RESHARD and LEROY RESHARD,

PETITIONERS,

VERSUS

DR. EARL BRITT, DR. GEORGE BONK,
DR. DAVID MOORE, DR. PANKAJ CHOKHAWALA,
TALLAHASSEE MEDICAL CENTER, INC.
d.b.a., TALLAHASSEE COMMUNITY HOSPITAL,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CONNIE RESHARD, ESQUIRE
1825 CONNECTICUT AVENUE, N.W.,
SUITE 200
WASHINGTON, D.C. 20009
202-745-4862

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether dismissal of wrongful death action under Rule 16(f), Rule 37(b)(2), and Rule 41 (b), Fed. R.Civ. P. for alleged discovery abuses, violated due process of law because the other side committed discovery abuses, destroyed and concealed material evidence before and during course of litigation, including the heart and ruptured aorta which caused the death of the decedent, because material evidence was excluded and because plaintiffs did not abuse discovery.

2. Whether the order of dismissal was a final order under 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure because a Rule 59(e) motion for reconsideration was still pending before the magistrate judge under 28 U.S.C. § 636(b)(1)(A), (B), and (C).

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING WRIT OF CERTIORARI	34
APPENDIX	

TABLE OF AUTHORITIES

PAGE

SUPREME COURT CASES

Anderson v. City of Bessemer City, N.C., 470 U.S. 578, 105 S.Ct. 1504 (1985) 53

Beech Aircraft Corp. v. Rainey, 109 S.Ct. 439 (1988) 38

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971) 39

Browder v. Director Ill. Dept. of Corrections, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) 61

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. ____, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) 55

Buchanan v. Stanships Inc., 488 U.S. ____, 108 S.Ct. 1130, 99 L.Ed.2d 289 (1988) PASSIM

Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991) PASSIM

Christainson v. Colt Industries Operating Corp., 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). 46

Cooter & Gell v. Hartmarx, Inc.,
496 U.S. ____, 110 S.Ct. 2447,
110 L.Ed.2d 359 (1990) 52

Gompers v. Bucks Stove & Range Co.,
221 U.S. 418 (1911) 39

Griggs v. Provident Consumer Discount Co.,
459 U.S. 56, 103 S.Ct. 400, 74
L.Ed.2d 225 (1982) 64

Hovey v. Elliott,
167 U.S. 409 (1897 39

Insurance Corp. of Ireland v. Compagnie des Bauxities de Guinee,
456 U.S. 694, 102 S.Ct. 2099,
72 L.Ed.2d 492 (1982) 40

Lytle v. Household Mfg., Inc.,
494 U.S. 545, 110 S.Ct. 1331,
108 L.Ed.2d 504 (1990) **54**

Matthews v. Eldridge,
424 U.S. 319, 96 S.Ct. 893, 47
L.Ed.2d 18 (1976) 39

National Hockey League v. Metropolitan Hockey Club, Inc.,
427 U.S. 639, 96 S.Ct. 2778, 49
L.Ed.2d 7471 (1976) 39

Pavelic & Leflore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989) 52

Rubin v. United States,
449 U.S. 424, 101 S.Ct. 698, 66
L.Ed.2d 633 (1981) 51

Walker v. ARMCO Steel Corp.,
446 U.S. 740, 100 S.Ct. 1978,
64 L.Ed.2 659 (1980) 51

Zubernibm et al. v. Burch,
___U.S._____, 110 S.Ct. 975
(1990) 39

FEDERAL CASES

Adriana International Corp. v. Thoeren,
913 F.2d 1406 (9th Cir. 1990) **36, 48**

Aztec Steel Co. v. Florida Steel Corp.,
691 F.2d 480 (11th Cir. 1982),
cert denied 460 U.S. 1040
(1983) 41

Donaldson v. Clark,
786 F.2d 1570 (11th Cir. 1986) 44

Equal Employment Opportunity Comm'n. v.
Carter Carburetor,
577 F.2d 43 (8th Cir. 1978),
cert. denied, 439 U.S. 1081, 99
S.Ct. 865, 59 L.Ed.2d 52
(1979) **35, 43**

Fjelstad v. American Honda Motor Co.,
762 F.2d 1334 (9th Cir. 1985) 40

Hicks v. Feeney,
850 F.2d 152 (3rd Cir. 1988) 37

Keene Corp. v. Int'l, Fidelity Ins. Co.,
561 F.Supp 656, 665 (D.C. Ill. 1982), aff'd.,unrep. 735 F.2d 1367 (7th Cir.? 1984), aff'd., 736 F.2d 388 (7th Cir. 1984) 62

Malone v. United States,
833 F.2d 128, 130 (9th Cir. 1987), cert. denied sub nom Malone v. Frank, 458 U.S. 819, 109 S.Ct. 59, 102 L.Ed.2d 37 (1988) 47

Reshard v. Britt,
819 F.2d 1573 (11th Cir. 1987), rev'd., vacated, 831 F.2d 222 (11th Cir. 1987), aff'd. on other grounds, 839 F.2d 1499 (11th Cir. 1988)(en banc) PASSIM

Standard Guaranty Ins. v. Fidelity & Deposit,
140 F.R.D. 5 (M.D.Fla. 1991), rev'd in part, vacated in part, unpub. mem., No. 92-2034 (11th Cir. 12/11/92) 53

In re Rubin,
769 F.2d 611 (9th Cir. 1985) **48**

United States v. Gargano,
826 F.2d 610 (7th Cir. 1987) 64

United States v. National Medical Enterprises,
792 F.2d 906 (9th Cir. 1986) 64

United States v. Reddick,
620 F.2d 606 (7th Cir. 1980)61, 63

United States v. Smith,
453 F.2d 149 (5th Cir. 1970) 56

U.S. For Use of Wiltec Guam v. Kahaluu Constr. and Industrial Indemnity Co.,
857 F.2d 600, (9th Cir. 1988) 53

CONSTITUTION

ADMENDMENT V, U.S. CONSTITUTION 34
ADMENDMENT XIV, U.S. CONSTITUTION 34

FEDERAL STATUTES

28 U.S.C. § 636 PASSIM
28 U.S.C. § 753(B) PASSIM
28 U.S.C. § 1254 PASSIM
28 U.S.C. § 1291 PASSIM
28 U.S.C. § 1332 PASSIM

FEDERAL RULES

F.R.A.P. 4 PASSIM
F.R.A.P. 10 PASSIM
F.R.C.P. 11 PASSIM
F.R.C.P. 16 PASSIM
F.R.C.P. 26 PASSIM
F.R.C.P. 30 PASSIM
F.R.C.P. 32 PASSIM
F.R.C.P. 33 PASSIM
F.R.C.P. 34 PASSIM
F.R.C.P. 37 PASSIM
F.R.C.P. 41 PASSIM
F.R.C.P. 52 PASSIM
F.R.C.P. 59 PASSIM
F.R.C.P. 60 PASSIM
F.R.C.P. 72 PASSIM

STATE DECISIONS

Atkins v. Humes,
110 So.2d 663 (Fla. 1959) **58**

STATE STATUTES

FLORIDA DEATH STATUTE,
§ 768.16 ET SEQ. PASSIM

FLORIDA STATUTE § 395,002 ET SEQ. PASSIM

FLORIDA STATUTE § 766.204 PASSIM

PERIODICALS

Diagnostic 7 Statistical Manual of Mental Disorders (DSM-III-R), 3rd ed. American Psychiatric Association, Wash., D.C. 1987

2A Moore's Federal Practice, paragraph 11.01[4]

Gordy and Gray, Attorney's Textbook of Medicine, Vol. 3A, 3rd ed. M. Binder (1973) ¶ 76.11

Heiderscheit, Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal, 68 Ore.L.Rev. 57, 72-73 (1989)

Modern Drug Encyclopedia, York Medical Books, Technical Publishers, 1981, pp. 744, 752

Physicians Desk Reference (PDR), Medical

Physicians Desk Reference (PDR), Medical Economics Co. Inc., Oradell, N.J., 44 ed. 1990

Psychiatric PeerReview, American Association (APA), Washington, D.C.

TO THE HONORABLE SUPREME COURT:

Connie Reshard and Leroy Reshard, petitioners file this petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit was issued on September 30, 1992, No. 92-3542 (TJOFLAT, Chief Judge, KRAVITCH and HATCHETT, Associate Judges). The order affirmed the dismissal of the case with prejudice for alleged violations of discovery. It is unreported and produced in the Appendix. App. at 1-4).

The court of appeals denied rehearing by the Panel and suggestion of en banc review on December 23, 1992. App. at 5. Petitioners sought a stay of mandate, pending application for a writ of

certiorari on January 5, 1993. It was denied on February 26, 1993. App. at 7. The order issued as the mandate on February 26, 1993 is different from the order issued on September 30, 1992. Both versions are provided. Appellant's Motion to Settle the Record under Rule 10, Fed.R.App.P. was denied on September 30, 1992. App. at 5-7.

On May 6, 1991, the United States District Court for the Northern District of Florida, Tallahassee Division entered an order adopting a Order, Report and Recommendation by Magistrate Judge William Sherrill. The order dismissed the action with prejudice pursuant to Rules 16(f), 41(b), and 37(b)(2), Fed.R.Civ.P. for alleged discovery violations, No. 85-7216-ws. (WILLIAM STAFFORD, Chief Judge). The order also awarded cost and attorney

fees to defendants, for the alleged discovery violations. App. at 7-13.

The Order, Report and Recommendation which dismissed the case was filed on December 14, 1990. (WILLIAM SHERRILL, Magistrate Judge). App. at 15-105.

JURISDICTIONAL STATEMENT

This court's jurisdiction to review the United States Court of Appeals for the Eleventh Circuit Order of September 30, 1992 is invoked pursuant to 28 U.S.C.A. § 1254.

Section 1291, Title 28 of the United States Code was invoked for jurisdiction before the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION:

AMENDMENT V READS:

No person shall . . . be deprived of

life, liberty or property, without due process of law . . . .

AMENDMENT XIV READS:

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

FEDERAL STATUTES:

28 U.S.C.A. § 636 App. at

28 U.S.C. § 753(b) App. at

28 U.S.C.A. § 1254 App. at

28 U.S.C.A. § 1291 App. at

Federal Rules of Appellate Procedure

Rule 4, App. at 107

Rule 10, App. at 108

Federal Rules of Civil Procedure

Rule 11, App. at 109

Rule 16, App. at 110

Rule 26, App. at 116

Rule 30, App. at 128

Rule 32, App. at 131

Rule 33, App. at 132

Rule 34, App. at 135

Rule 37, App. at 137

Rule 41, App. at 144

Rule 52, App. at 145

Rule 59, App. at 146

Rule 60, App. at 147

Rule 72, App. at 148

Florida Statutes:

Section 395,002 et seq. App. at 151

Florida Wrongful Death Statute, § 768.16 et seq., App. at 156

STATEMENT OF CASE

This is a wrongful death case under a theory of medical malpractice. It was filed on July 29, 1985 in the United

States District Court for the Northern District of Florida, Tallahassee Division, under the diversity of citizenship subject matter jurisdiction, pursuant to section 1332, Title 28 of the United States Code. (R1-1-2).[1]

Florida Wrongful Death Statute, Fla Stat. § 768 et seq. authorizes compensatory and punitive damages on behalf of the estate and certain survivors. App. at Plaintiffs complied with the provisions and stated that the gross and wilful negligence of the defendants was the cause of the death of Minnie Lee Reshard, the decedent. The Defendants are Dr. Earl Britt, Dr. George Bonk, Dr. Pankaj Chokhawala, Dr. David

---

[1] The Eleventh Circuit reviews cases on the original record and the citations so noted apply herein. (R volume - doc. - page number).

Moore, Tallahassee Medical Center, Inc. d.b.a., Tallahassee Community Hospital (Hereafter "TCH"), and Tallahassee Memorial Regional Medical Center (Hereafter "TMRMC"). TMRMC was dismissed as a party on January 30, 1986.

About 4 A.M. on August 2, 1983, decedent was awaken with severe pain in the upper chest, which spread to her arms and legs. She was taken to TCH Hospital but did not see a doctor for more than 4 hours.

On August 2, 1983, a set of chest x-rays were taken and read by Dr. Britt and the radiologist, Dr. Bonk. Dr. Britt then ordered a second set of chest x-rays that same day. Both certified the chest x-rays as normal. However, the chest x-rays are

clearly abnormal[2] and show evidence of an acute aneurysm, a life threatening condition, which required immediate surgery. (R7-281) (R9-347) (R8-321) (Affidavits by Dr. Reginald Peniston[3] and

---

[2] A dissecting aneurysm causes the aorta to widen, and its presence can be detected on a plain chest x-ray in 90 percent of patients. Robert Berkow, Md., The Merck Manual, Merck Research Laboratories, Rahway, J.J., 1992, Chp. 27, p. 573, ¶ 4.

[3] "I was shown a chest x-ray [of the decedent] and asked if I thought it was normal. I replied that it did not look normal to me and further that if the patient had chest pains, that further testing was required . . . I showed the x-ray[s] to two separate radiologists with the statement that this was a patient with chest pains. Both radiologists found x-rays worrisome and abnormal regarding the aortic silhouette and freely offered the possibility of aortic dissection . . . If these x-rays had been interpreted with a greater degree of clinical suspicion, then a CT scan of the chest or an anteriogram would have been performed promptly and surgery would have been performed. The chance of survival would have been about seventy (70) percent . . .Since the patient had recurrent chest pains while

Dr. Childress).

TCH was not equipped to perform the surgery and should have transferred the decedent to TMRMC, but did not. Under its operating procedures, TCH allowed Dr. Bonk to read the chest x-rays taken in the TCH emergency room on August 2, 1983 several days later.[4] An aortic dissection in the ascending aorta is a life threatening emergency which is exacerbated by unregulated blood pressure which can and did lead to rupture of the aorta, allowing

---

hospitalized and since the physicians were convinced that she had a neuropsychiatric problem they did not even entertain the diagnosis of dissecting aneurysm . . . ." Dr. Reginald Peniston, Thoracic surgeon.

[4] TCH's culpability can be determined from provisions of the Joint Commission on Accreditation of Health care Organizations (JCAH) and Florida Statute 395.002 et seq. (App. at 147-152). Hospitals are required to maintain certain operating procedures applicable to its conduct with the decedent.

blood to flow back down into the heart sac (pericardium), thus, causing death by cardiac tamponade. A nurse found the decedent dead sometime on the morning of August 6, 1983.

With proper diagnosis and surgery the decedent's chance of survival was 70 percent. Without surgery, rupture leads to death 90-95 percent of untreated patients.

Despite the decedent's clinical history of hypertension, dating from 1969 and treatment for hypertension by Dr. Britt personally beginning in 1978, he virtually ignored the cardio complaint and treated her for depression. Dr. Britt had prescribed the decedent 160 mg. of Inderal per day for hypertension. Still by noon on August 2, 1983, Dr. Britt called in Dr. Chokhawala, a psychiatrist. Dr.

Chokhawala administered a potent antidepressant, desyrel, which enhanced the risk of death from the rupture of the aneurysm. During an aorta dissection, unregulated blood pressure can lead to rupture of the ascending aorta that the decedent experienced.

Further, since 1980 Defendant David Moore had been administering two potent antidepressants, pamelor and prolixin, which caused unstable blood pressure management, according to established medical literature and reports obtained from the Food and Drug Administration in 1986.[5] (R9-341-3-7).

---

[5] Modern Drug Encyclopedia, York Medical Books, Technical Publishers, 1981, pp. 744, 752; Physicians Desk Reference (PDR), Medical Economics Co. Inc., Oradell, N.J., 44 ed. 1990; Gordy and gray, Attorney's Textbook of Medicine, Vol. 3A, 3rd ed. M. Binder (1973) ¶ 76.11; see also diagnostic 7 Statistical Manual of Mental Disorders (DSM-III-R), 3rd ed.

These drugs are contraindicated for hypertension. Hypertension causes the weakening of the aortic wall which leads to aneurysms.[6] Management of blood pressure is essential to prevent aneurysm for people not predisposed to them genetically as decedent had no genetic

---

American Psychiatric Association, Wash., D.C. 1987; Psychiatric Peer Review, American Association (APA), Washington, D.C. The PDR is designated by the APA as a reasonable source for drug information since "substantial evidence" of drug effects is used for its information.

Dr. Michael Childress states: "The cardiac and aortic changes are suggestive of systemic hypertension." As a point of reference, a routine chest x-ray of the decedent, taken in February 1979, shows a normal size heart and silhouette. (R2-75)(records obtained from Dr. Britt and TMRMC).

[6] Dr. Michael Childress states: "The cardiac and aortic shanges are suggestive of systemic hypertension." As a point of reference, a routine chest x-ray of the decedent, taken in February 1979, shows a normal size heart and silhouette. (R2-75)(records obtained from Dr. Britt and TMRMC).

condition. The untreated aneurysm, the failure to move the decedent to TMRMC, and the administration of pamelor, prolixin and desyrel led to the death of decedent.

Dr. Jerry Harris, a State of Florida Medical Examiner performed an autopsy on August 7, 1983. Dr. Britt was present. Dr. Harris stated that the decedent had died of a rupture in the ascending aorta. He specially stated the damage was confined to a small section between the base of the aorta. Dr. Harris specifically stated, demonstrated by diagram and by model that the aneurysm had not reached the aortic arch. (App. at 166-167). The rupture was said to end in the ascending aorta.[7] This oral

---

[7] This means that the later written autopsy report which states that the aneurysm extended into the aortic arch and down through the renal arteries (near the

kidneys) cannot be true. Dr. Harris cut the aorta open on August 7, 1983 while Connie and Leroy Reshard waited in the next room. We met with Dr. Harris and the other persons mentioned immediately after he conducted the autopsy. The decedent's body was removed by the mortician as we met that same day. A physical tear would either continue or end. Once it ended, the space immediately following the tear would be clear. This is no mistake. This was an attempt to make the decedent's condition appear worst than it actually was.

The autopsy report stated: "In the ascending aorta, approximately 1.5 cm. above the aortic valve, is an irregular linear horizontal tear which extends approximately 50% of the circumference of the vessel. Beneath the tear there is a dissection of the outer 1/3 of the aorta from the inner 2/3. This dissection extends proximally to the pericardia sac and distally involves the entire thoracic aorta and abdominal aorta down below the renal arteries." Dr. Jerry Harris, State of Florida Medical Examiner, 9/16/83. (R7-281-Attachment I at 2).

Dr. Michael Childress, the radiologist expert for Petitioners, statement supports the fact that the aneurysm was confined to the ascending aorta. Please note the underlined portions of the report.

Portable Exam: The patient is rotated

explanation was given by Dr. Harris and Dr. Britt to Connie and Leroy Reshard in the presence of two TCH personnel, Virginia Shepard and Zippy Doyle on August 7, 1983 and by Dr. Harris alone on August

---

toward the left posterior oblique position. The ectatic and unfolded aorta appears to be associated with enlargement of the cardiac silhouette. The descending aorta is indistinct but this could be related to technique. A full inspiration was not obtained.

Routine Exam: The descending aorta appears distinct. The aortic dilation and unfolding displaces the trachea to the right. The paratracheal shadows are prominent which could be related to ectatic brachiocephalic vessels or thyroid enlargement. No pleural fluid or parenchymal consolidation identifiable. The cardiac and aortic changes are suggestive of systemic hypertension.

Impression: Ectasia and unfolding of the aorta are associated with enlargement of the cardiac silhouette and probable left ventricular enlargement. The appearance of the aorta is consistent with and suggestive of aortic dissection, especially chronic. The cardiac and aortic changes suggest the possibility of systemic hypertension.

12, 1983. A drawing was made by Dr. Harris which illustrated the small area of the dissection just above the heart. These facts clearly establish that the aneurysm did not continue down near the kidneys, via the renal arteries. This documentation was submitted into evidence on August 3, 1990. (R7-281).

At August 7th meeting, the Reshards were told by Dr. Britt that the aneurysm could not be detected from the chest x-rays that were taken, that there was no basis for further diagnostic test, and that she would have died inspite of surgery because only about 30 percent of the patients survive with surgery. Clear medical evidence indicate that none of the statements were true.

During the second meeting with Dr. Harris, the mortician, and the Reshards --

Leroy, Connie and James, the mortician told the Reshards that the heart and upper portion (the aorta) had been removed. Dr. Harris repeated the same set of facts in the earlier meeting. The Reshard's confronted him about the removal of the decedent's heart. Dr. Harris acknowledged that he had removed it and had it in his possession. However, he would not even allow the Reshard's to see it.

The decedent's records began to disappear after Leroy and Connie Reshard consulted a lawyer the week of August 15, 1983.[8]

---

[8] We asked Elwin Thrasher, the attorney we consulted to evaluate the case for medical malpractice and to contact Dr. Harris about obtaining the autopsy. A typewritten clinical resume containing the diagnosis and prognosis of the decedent, which had been prepared by Dr. Chokhawala during the decedent's stay at TCH was given to and discussed with Thrasher. An original medical sheet (not from TCH) but prepared by Dr. Britt prior to the

In an effort to prepare Plaintiffs' expert medical witnesses in July 1990, Dr. Harris was subpoenaed to produce the heart and aorta. He then stated that TCH had everything he had conducted regarding the case. (R7-281- Affidavits F-G). Shortly thereafter all discovery was stayed. (R7-276).

When James Reshard obtained decedent's x-rays from TCH in July 1984, the envelope which was labeled thyroid Scan was empty. (R4-183-Exhibits). The

---

decedent's death was also given to Elwin Thrasher. He did not return these documents and we later learned that they were no longer in the TCH's records on the decedent or in Dr. Britt's files on the decedent. When the autopsy report was issued in September 1983, it now stated that the aneurysm was so extensive, moving from the base of the aorta through the aortic arch and down to the renal arteries near the kidneys. The fact that the heart was removed is not recorded in any of the documentation given to the Reshards before the case commenced or during discovery.

scan is a nuclear medicine picture similar to an x-ray film. See App. 197-199. The thyroid is located in the thoracic cavity and is visible from a plain chest x-ray. Dr. Bonk is the expert in nuclear medicine at TCH. See Affidavit by radiologist, Dr. Michael Childress. (Supra, Note no. 8). The chest x-ray envelope contained four (4) films, one of which did not complete the series of films. According to James Reshard, a person who works in radiology that he knows alerted him to the fact that the aneurysm can be detected from a plain chest x-ray. This was the reason he picked-up the chest x-rays in July 1984. Although Virginia Shepard of TCH had promised the Reshards the x-rays on August 7, 1983, she held them back when Leroy and James Reshard picked-up a copy of some of the hospital records of the

decedent on or about August 10, 1983 after making two trips to TCH. In front of the Reshards, Virginia Shepard selectively removed items from the file which were not given to the Reshards. (R7-281-Affidavits by Leroy (App. at 162-167) and James Reshard (App. at 178-179)).

No lawyer in the Tallahassee area would assist the Reshards. Not one of these lawyers ever asked to see the chest x-rays. Some were honest and said that they were a friend of Dr. Britt's; others were less forthright. Wadsworth and Davis was one of the lawyers consulted. Another law firm indicated an interest because it wanted to nail Dr. Britt, but declined further involvement because other doctors were also culpable. For these reasons, Plaintiffs proceeded pro se.

COURSE OF PROCEEDINGS

On September 8, 1986, Plaintiffs were disqualified from proceeding Pro Se. (R3-146). An appeal was taken. Reshard v. Britt, 819 F.2d 1573 (11th Cir. 1987), rev'd., vacated, 831 F.2d 222 (11th Cir. 1987), aff'd. on other grounds, 839 F.2d 1499 (11th Cir. 1988)(en banc)(court evenly divided).[9]

By Order on October 17, 1989, District Court Judge Stafford assigned all pretrial matters to Magistrate William Sherrill without the consent of the Parties, pursuant to 28 U.S.C. § 636 (b)(1)(A) et seq. (R4-171). App. at 107.

Before the appeal, supra, in 1986, several disputes involving discovery were

---

[9] During the course of the appeal Connie Reshard became a lawyer. After the appeal, she moved to proceed in pro hac vice on June 9, 1988. Defendant Britt objected. The motion was granted on 11/8/88 (R4-165).

pending including Plaintiffs Motion to Disqualify Defense Counsel and for a Default Judgment (R2-116), as amended (R3-139). Connie Reshard and Lloyd Reshard had consulted with Wadsworth and Davis in April 1984 for about an hour and fifteen minutes. There was identity of issues, exchange of confidential information in detail , and an attorney-client relationship attached. Wadsworth and Davis disputed the account and denied that confidential information had been shared with them and other defense counsel, who in turn used the information to enhance their ability to frustrate plaintiffs' discovery. Magistrate Sherrill denied the Motion to Disqualify and based on the denial of the Motion, he denied the Default Judgment, and issued his findings in a Report and Recommendation on April

17, 1990. (R4-186). Plaintiffs filed objections. The district judge adopted the Magistrate's April 17, 1990 recommendation on August 13, 1990.

Discovery resumed under a new discovery order of April 17, 1990 - August 17, 1990. (R4-185). Defendants were authorized to schedule their discovery first by court order on April 12, 1990. (App. 105-106, See Rule 26(d), Fed.R.Civ.P. App. at 124 (R4-184). After a month, Defendants obtained court order to schedule the following depositions by August 17, 1990. Plaintiffs were ordered to permit discovery by oral deposition of Leroy and Connie Reshard, Rosa Walker-Virgil and Brenda Reshard.[10] Plaintiffs complied on

---

[10] In August 1986, defendants first notice the taking of oral depositions of these persons and other witnesses some of

June 27 and 28, 1990. Plaintiffs had a Motion to Compel Discovery which was granted in part and denied in part on April 12, 1990. Specifically, Defendant TCH had denied that it had any other evidence when counsel William Davis knew that it had been given the decedent's heart and aorta. Despite presenting this new information to the district court, the court still refused to compel production of the evidence from TCH, pursuant to Plaintiffs' Motion to Compel. The district court ruled Plaintiffs Request of Production was defective despite

---

whom were out of the state of Florida. No subpoenas were served in compliance with Rule 30(g)(2). App. at 130-131. Plaintiffs sought a protective order for their depositions under Rule 26(c) (App. at 122) and Rule 37(d) App at 144. Plaintiffs motion for protective order was denied and the magistrate judge ruled that they had no standing to complain about the lack of subpoenas despite Rule 30(g)(2).

Plaintiffs designation of Rule 34 and that copies of the documents regarding the thyroid scan, clinical resume, and other records of the decedent. In contrast, Plaintiffs were directed to produce for inspection in the law offices of defendants counsel in the same manner that Plaintiffs had requested production. Magistrate Judge Sherrill directed Plaintiffs to provide production by traditional means "or in the alternative, serve upon all defendants complete and readable copies, of all of the documents identified in request for production . . . ." (R4-184-4).

Without first receiving a court order for discovery of Plaintiffs experts under Rule 26(b)(4), Defendants sought a discovery conference on June 12, 1990. (R5-218). The Magistrate granted the

request and scheduled a conference on June 20, 1990, a date defense counsel had submitted but that Jeannette Andrews knew Connie Reshard was unavailable. (R5-220). Connie Reshard notified the court by express mail on June 18, 1990 with next day delivery of her unavailability, but it was not received until two days by U.S. Postal error, in order to record her objection and unavailability. The Magistrate proceeded in face of objections by Connie Reshard.

The Magistrate took this opportunity to relieve Defendants TCH and Dr. Chokhawala of the discovery abuses regarding the thyroid scan and clinical resume. In the April 17, 1990 Report and Recommendation (R4-186), the magistrate made no findings of fact regarding those issues. Now he would make findings of

fact on these issues in favor of the defendants, via general discovery order. A subsequent Motion to Quash and to Impose Rule 11 Sanctions on June 27, 1990 by the Plaintiffs was denied. (R5-228). Defendants notice of the taking of depositions of Dr. Taylor and Dr. Peniston which were scheduled for July 17 and 18, 1990 were defective and not in compliance with Rule 26(b)(4). (App. at 120-121).

Plaintiffs appealed to Judge Stafford under Rule 72(a) and 28 U.S.C. 636 of this series of Orders by the Magistrate on July 2, 1990 for the June 14 and 20, 1990 Orders (R5-223) and on July 16, 1990 for the June 27, 1990 Order (R6-252). When the depositions were scheduled, the appeals process was not complete and efforts to obtain the decedent's heart were delayed because defendant TCH had

concealed that it either had possession of the organ or had destroyed this vital piece of evidence. Other issues of destroyed or concealed evidence had also been the source of Motions to Compel and impose Sanctions under Rules 37(b)(2) and Rule 11 of the Fed R.Civ.P. None of the efforts to obtain discovery and sanctions by Plaintiffs were granted despite the obvious prejudicial error regarding the depositions of medical expert witnesses of the Plaintiffs and other evidence. Plaintiffs did not know the opinions or identity of experts to be used at trial by the Defendants even though such information had been requested in 1986, but no supplementation of interrogatories were made in compliance with Rule 26(e). (App. at 124) They were not compelled to disclose this information in open court on

June 29, 1990 regarding the Plaintiffs Motion to Quash the taking of depositions from its medical experts, even when Jeannette Andrews admitted that Defendants already had retained such experts and were consulting with them in preparation for the depositions. The correctness of the transcript of that proceeding is in dispute. (R14-257).[11] Production of the audio tapes will demonstrate the material alteration of the transcript and, thus, the assignment of wrongful conduct to the appropriate person(s).

Defendants obtained a deposition from Dr. Taylor, who falsely stated that he was not an expert for Plaintiffs. Dr.

---

[11] Motion to Settle Record under Rule 10, Fed.R.App.P. was first denied without prejudice. App. at 5-7). Issue was mooted when court of appeals affirmed the dismissal of the case without first remanding it to correct the record.

Reginald Peniston, a thoracic surgeon was not deposed. On July 27, 1990, Ms. Andrews filed a Motion for sanctions and dismissal. (R6-270). All discovery was stayed and scheduled depositions by Plaintiffs of the Defendants and their witness list, were not taken, as of July 31, 1990. (R7-276).

The other Defendants either adopted the Motion for Sanctions and Dismissal or filed directly for the same or a Motion for Summary Judgment. A hearing was scheduled for November 8, 1990, but was cancelled due to the illness of Connie Reshard. Defendant counsel for Dr. Chokhawala, William Smith, filed a copy of the transcript of Connie Reshard's deposition even though she did not have actual receipt of its transcription and therefore had not reviewed it. (R15, 16-

301).

A hearing was held on December 6, 1990 in which the Magistrate denied all findings of fact regarding the destruction and concealment of evidence against Defendants, including a Rule 60, Fed. R.Civ. P. Motion by Plaintiffs to correct the previous findings of facts on these issues. App. at 30[12]He recommended that the case be dismissed because Plaintiffs failed to attend the depositions of Dr. Taylor and Dr. Peniston. He cited virtually every dispute in the case and found Connie Reshard at fault, when she had complied with the Court's orders.

---

[12] See also discussion of Dr. Chokhawala's clinical summary resume at hearing on April 12, 1990. App. at 158-162. Connie Reshard always stated that there was a second document already typed which had been in the decedent's hospital records, in addition to the handwritten consultation report, the magistrate judge refers to.

Because the Motion for a Scheduling Conference was ordered by the Magistrate (R5-220) and the Motion to Quash the Subpoenas and Impose Rule 11 Sanction (R5-229) were wrongly decided, the failure to appear for the depositions were justified.

Other examples can be used to support that conclusion. Plaintiffs were ordered to return the decedent's x-rays to TCH even though the x-rays were in the possession and control of a nonparty. Despite the fact that Plaintiffs had not disobeyed the district court's order, the magistrate found that Connie Reshard had violated a court order in the December 14, 1990 Order. (R10-376). Although the Magistrate did not accept Connie Reshard's explanations, submission into evidence of the July 3, 1986 letter from Dr. Taylor documenting his retainment as an expert

witness, or the oral Motion for in-cameral inspection by the court only of further documentation contradicting Dr. Taylor's assertion that he was not an expert for plaintiffs, he found that Connie Reshard had not given truthful testimony about the Plaintiffs expert testimony from Dr. Taylor. Other evidence was excluded as well. An Order, Report and Recommendation of dismissal with prejudice was entered on December 14, 1990. (R10-376).

Plaintiffs filed a Motion for Reconsideration on December 27, 1990 (R10-378), but the Magistrate never acted on it. Thereafter, Judge Stafford ordered that the Motion be recast as Plaintiffs' objection under the appeal's process of Rule 72, Fed. R. Civ. P. and 28 U.S.C. 636. (R10-378). App. at 7-15. Plaintiffs adopted that Motion as its

objection because there was insufficient time to respond further in accordance with Rule 72(a) and (b), Fed.R.Civ.P. App. at 148. The case was dismissed pursuant to Rule 16(f), Rule 37(b)(2) and Rule 41(b) on May 6, 1991 by District Court Judge Stafford. The determination of the grant of attorneys fees and cost as a Sanction were assigned to the Magistrate. He stayed further proceedings on August 8, 1991. (R10-397). A Notice of Appeal under 28 U.S.C. 1291 was taken on June 4, 1991. (R10-417, 418).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Supreme Court should exercise its discretion and grant a writ of certiorari in this case because the Eleventh, Third,

Eight and Ninth Circuits are applying substantially different guidelines for discovery sanctions. This situation leads to uneven resolution of property rights and decisions which are for some litigants, unjust. Disputes arising in the area of discovery and pretrial case management is the most important stage of litigation and the most promising stage for settlement resolution, provided that dispute resolutions at this juncture are enforced fairly between the parties.

1. The Eleventh Circuit decision to affirm dismissal of this case under Rule 16(f), Rule 37(b)(2), and Rule 41(b) directly conflicts with the decision in Equal Employment Opportunity Comm'n. v. Carter Carburetor, 577 F.2d 43 (8th Cir. 1978), cert. denied, 439 U.S. 1081, 99 S.Ct. 865, 59 L.Ed.2d 52 (1979). That

court held that sanctions were inappropriate where discovery abuses could be assigned to both sides. Id at 48.

The Eleventh Circuit decision also conflicts with the disposition of sanctions for discovery infractions in the Ninth Circuit, Adriana International Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990); In re Rubin, 769 F.2d 611, 619 (9th Cir. 1985) (prior sanctions must be awarded first and requires specific warning of dismissal sanction first); Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1337-1339 (9th Cir. 1985) (answers to interrogatories incomplete, evasive, and false, but objections were not made in bad faith); United States v. National Medical Enterprises, 792 F.2d 906, 912 (9th Cir. 1986)(reversed because no clear warning of dismissal was given to the plaintiff).

Because the Order of Dismissal relied on Hicks v. Feeney, 850 F.2d 152, 156 (3rd Cir. 1988), the Third Circuit guidelines for resolving and applying discovery sanctions under Rule 37 is in conflict with the Ninth Circuit. App. at 93.

Neither is the decision consistent with the Supreme Court's rulings in Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2132 (1991); Lytle v. Household Mfg., Inc., 494 U.S. 545, 110 S.Ct. 1331, 1338, 108 L.Ed.2d 504 (1990); Insurance Corp. of Ireland v. Compagnie des Bauxities de Guinee, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982) (punitive dismissal of a lawsuit must be just).

2. Restriction of material evidence which would contradict certain factual findings and conclusions of law with respect to discovery abuses is

inconsistent with due process of law. Beech Aircraft Corp. v. Rainey, U.S. ,109 S.Ct. 439 (1988)

3. The order of dismissal was not a final order under 28 U.S.C. § 1291 because a Motion to Reconsider was still pending before the magistrate judge pursuant to authority granted under 28 U.S.C. § 636 (b)(1)(A), (B), and (C).

I. DISMISSAL OF WRONGFUL DEATH ACTION UNDER RULE 16(F), RULE 37(B)(2), AND RULE 41(B) FOR ALLEGED DISCOVERY ABUSES VIOLATES DUE PROCESS OF LAW.

There has been a failure of due process of law under the Fifth and Fourteenth Amendments. Before dismissing a case, the Court must demonstrate substantive and procedural due process of

law. Zubernibm et al. v. Burch, ___U.S. __, 110 S.Ct. 975 (1990); Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); Boddie v. Connecticut, 401 U.S. 371, 374, 91 S.Ct. 780, 784 (1971).

"The basic thrust of the due process limitation is that any sanction which does not, at least in part, rest on a litigant's interest in amelioration of prejudice is a deprivation of property by the state, and therefore, certain protections should generally be required." Heiderscheit, Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal, 68 Ore.L.Rev. 57, 72-73 (1989);[13] See also, Hovey v. Elliott, 167

---

[13] After the Supreme Court issued National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 7471 (1976), some scholars criticized the

U.S. 409 (1897); Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1341 (9th Cir. 1985).

In Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d

---

punitive approach on due process grounds. In a Note published in the Harvard Law Review, it was noted that punitive sanctions "[i]gnores or understates the problems of fairness in such a rule . . . For instance a requirement of a litigation-ending sanction would be inappropriate in cases where both parties are at fault; to punish one and not the other would be unfair . . . Relying on Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911), actual notice that a punitive sanction may be imposed, proof of wilful failure beyond a reasonable doubt and the privilege against self-incrimination [would be required]. 221 U.S. 418, 444-49." Note, "The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions", 91 Harv.L.Rev. 1033, 1051 (1978). The noted stated, "Deterrence of discovery abuses, however frequently can be more effectively achieved if the court employs punitive sanctions other than dismissal or default. Id. at 1054.

492 (1982), the court stated that Rule 37(b)(2) requires that "any sanction must be just." The implication is that lower courts must apply sanctions in proportion to the discovery infraction and consider the conduct of the opposing party, particularly where the opposing party has not complied with discovery.

The court below relies on Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480 (11th Cir. 1982), cert denied 460 U.S. 1040 (1983). App. at 92-93. There the Plaintiff was said not to have served adequate answers to interrogatories three times. But compare, here Defendant TCH concealed the fact that it was given possession of the decedent's heart when it stated under oath in an interrogatory that it had given Plaintiffs access to all the information pertinent to decedent's

hospital records. Or consider that TCH and Dr. Chokhawala failed to produce copies or explain the destroyed clinical summary prepared by Dr. Chokhawala which is required by Florida law. Section 395. 302 Fla. Stat. Under that theory, defendants in this case would have defaulted the case, but for the failure of the district court to act to require the defendants to respond to these issues.

Despite numerous discovery violations including findings that the attorney had made false statements to the court, the court in Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1990), found that outright dismissal of lawsuit is too severe sanction and that less severe sanction of assessment of attorney fees is also within the court's exercise of its inherent powers to supervise litigation.

A. WHEN DISCOVERY INFRACTIONS CAN BE ASSIGNED TO BOTH SIDES, PUNITIVE SANCTION OF DISMISSAL VIOLATES DUE PROCESS OF LAW.

The **Eight Circuit** reversed a district court order which imposed sanctions for failure to make discovery because it found both parties had failed to proceed with discovery. Equal Employment Opportunity Commission v. Carter Carburetor, 577 F.2d 43, 48 (8th Cir. 1978), cert. denied, 99 S.Ct. 865 (1979). That court stated:

> "Since its inception this litigation has been plagued by discovery problems caused, to some extent, by antagonistic and on cooperating counsel from both the company and the EEOC." Id. at 44. The defendant had refused to answer interrogatories from EEOC, repeatedly. Id. at 45-47. The Panel stated: "Because of the way in which both parties have proceeded, or failed to proceed with

> discovery, and the manner in which the sanctions order was entered, we find that the district court exceeded its judicial power in limiting the evidence which the EEOC can present in this case . . . It can readily be seen, in reviewing the record, that both the EEOC and Carter Carburetor have displayed dilatory tactics during the discovery period." Id. at 48.

This decision by the Eleventh Circuit is in direct conflict with the decision in the Eight Circuit. While the Eleventh Circuit has held that the highest opportunity to be heard must be afforded when a sanction is punitive, Donaldson v. Clark, 786 F.2d 1570 (11th Cir. 1986), rev'd., 819 F.2d 1551 (11th Cir. 1987)(en banc), it has applied a rigid deterrence standard. It ignored the fact that TCH certified under oath in answering Petitioners interrogatories, that it had disclosed all information regarding the decedent when in fact it had not. TCH

never disclosed that it was given possession of the decedent's heart and aorta. The heart and aorta is equal in importance to the chest x-rays. Yet Petitioners have never had access to the organs for evaluation by their medical experts. Other records have been destroyed but no defendant was ordered to produce or admit that the items have been destroyed, thyroid scan, clinical summary by Dr. Chokhawala are illustrative. Fla. Stat. § 395.3015, App. at 155.

But compare the district court's determination that Connie Reshard was responsible for the chest x-rays of decedent in the possession of James Reshard, a nonparty had obtained in July 1984. Connie Reshard had copies of those x-rays in September 1984 and when defendant George Bonk requested the chest

x-rays, she produced the copies in response to his production request in July 1986. The district court was required to follow the same procedures against the defendants under the 'rule of the case.' Christainson v. Colt Industries Operating Corp., 486 U.S. 800, 108 s.Ct. 2166, 2177, 100 L.Ed.2d 811 (1988).

B. UNDER PRINCIPLES ENUNCIATED IN THE NINTH CIRCUIT, LACK OF IMPOSITION OF PRIOR SANCTIONS AND WARNING THAT DISMISSAL WOULD BE THE SANCTION, ORDER OF DISMISSAL WOULD NOT HAVE BEEN GRANTED.

The Ninth Circuit has developed a procedure for processing sanctions which arise in the area of discovery infractions that is consistent with due process of law. The action by the Eleventh Circuit directly conflicts with these procedures.

The Ninth Circuit requires consideration of the following:

(1) public interest in expeditious resolution of litigation;
(2) the court's need to manage its docket;
(3) the risk of prejudice to the other party;
(4) the public policy favoring the disposition of cases on the merits; and,
(5) the availability of less drastic sanctions.

Adriana International Corp. v. Thoeren, 913 F.2d 1406, 1413 (9th Cir. 1990)(corporation repeated failure to appear at scheduled depositions compounded by noncompliance with court orders to produce documents warranted default judgment; defendant failed to appear at 6 separate depositions).

The availability of less drastic sanctions was explained in Malone v. United States, 833 F.2d 128, 130 (9th Cir. 1987), cert. denied sub nom Malone v. Frank, 458 U.S. 819, 109 S.Ct. 59, 102 L.Ed.2d 37 (1988). It stated the following:

- did the court explicitly discuss

the feasibility of less drastic sanctions and explain why alternative sanctions would be inappropriate;

- did the court implement alternative sanctions before ordering dismissal, and

- did the court warn the party of the possibility of dismissal? Id at 132; In re Rubin, 769 F.2d 611, 618, n. 7 (9th Cir. 1985).

In applying those principles to this case, it was an abuse of discretion to dismiss the case.[14] There has been no prejudice to defendants under these facts. "A defendant suffers prejudice if the plaintiff's action impair the defendant's ability to go to trial or threaten to interfere with the Rightful decision of the case . . . Delay alone has been held to be insufficient prejudice citation omitted, failure to produce documents as ordered is considered sufficient

---

[14] Chambers v. NASCO Inc., ___U.S. _,111 S.Ct. 2123 (1991)

prejudice. citation omitted " 913 F.2d at 1412. Plaintiffs produced all documents requested. Instead the district court deferred making any factual determinations involving discovery infractions involving the Defendants. Defendants were not even ordered to disclose their medical experts while imposing the same requirements on Plaintiffs. Petitioners complied with all requests. This supports the disposition of the case on the merits, particularly when petitioners had alternate sources of proof other than the experts and the presence of destruction and concealment of evidence.

The availability of less drastic sanctions has not been satisfied by the district court in the case in issue. The district court never applied any sanctions prior to dismissal, and it did not warn

petitioners that the sanction would be dismissal of the lawsuit. Instead, the district court referred to the discovery plan's recitation of cost and attorney fees. (R4-187)

In this regard, Connie Reshard did not violate the district court's order to appear at the deposition of Dr. Taylor and Dr. Peniston. First, defendants counsel did not first seek permission to depose the medical witnesses. App. at 239. Second, she did not comply with the cost and fee requirements of Rule 26(b). App. at 120-121. Jeannette Andrews failed to sign the notice of taking of the deposition which would have the effect of implementing the court ordered depositions. The court's order was not self-executing. Rule 26(g) requires that a party does not have to respond when the

paper is not signed under Rule 26(g) and Rule 11. App. at 109-110. This means that the Motion to Strike of July 16, 1990, was not necessary once the date of the depositions had occurred, and Andrews Notice of deposition was moot.

Here the plain meaning of Rule 26(g) and Rule 11 is to be applied. This court stated the Federal Rules of Civil Procedure are to be given their plain meaning. Walker v. ARMCO Steel Corp., 446 U.S. 740, 750 n. 9, 100 S.Ct. 1978, 1985 n. 9, 64 L.ed.2 659 (1980). Judicial inquiry is complete when the terms are unambiguous. Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981).

Moreover the substantive importance of the signing requirements under Rule 11 and Rule 26(g), means that the signature

requirement is not just a ministerial act under landmark decisions of this court. Cooter & Gell v. Hartmarx, 496 U.S. ___, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); Pavelic & Leflore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989)(paper not signed violates Rule 11 and violation can be assigned only to the person signing the paper).

Further, evaluation of Rule 11 violations is not a prospective review but retrospective. The attorney must comply with the law at the time the pleading or paper is signed or filed without the signature. See Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987).

Other lower courts have enforced or recognized the failure to sign a discovery paper as a substantive violation of Rule

11 and Rule 26(g). Standard Guaranty Ins. v. Fidelity & Deposit, 140 F.R.D. 5 (M.D.Fla. 1991), rev'd in part, vacated in part, unpub. mem., No. 92-2034 (11th Cir. 12/11/92); U.S. For Use of Wiltec Guam v. Kahaluu Constr. and Industrial Indemnity Co., 857 F.2d 600, (9th Cir. 1988)(court cited nonsigning of a discovery paper as a discovery violation).

C. RESTRICTION OF MATERIAL EVIDENCE IS PREJUDICIAL AND VIOLATES DUE PROCESS OF LAW.

The District Court has the power to decide issues of law and fact under Rule 11, Rule 37, Rule 16, Rule 41 and its inherent powers. Chambers v. NASCO, Inc, 111 S.Ct. 2123, 2132 (1991); Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

Therefore, the failure of the district court to make factual findings of the following issues against the defendant-appellees is prejudicial error.[15] (R10-376-17). See Lytle v. Household Mfg., Inc., 494 U.S. 545, 555, 110 S.Ct. 1331, 1338, 108 L.Ed.2d 504 (1990).

Further, evidence of violations of

---

[15] (i) the destroyed clinical resume on the diagnosis and prognosis of decedent by defendant-appellee Dr. Chokhawala in August 1983; (ii) the issue of the destroyed thyroid scan clearly in the possession and control of TCH and the physician involved, presumably Dr. Bonk, the resident nuclear medicine expert at TCH; (iii) the discrepancy in the location of the decedent's aneurysm in actuality confined to a tiny area immediately above the heart in the ascending aorta, and the false autopsy report that the aneurysm was so evasive it extended all the way down to the renal arteries, the seriousness of both are accentuated by the possession of her heart and aorta, the primary evidence, by defendant-appellee TCH. Thus, other false information could well be contained in the document, which is prejudicial to Plaintiffs.

Rule 11, Fed. R. Civ. P. by defendant counsel Jeannette Andrews and other counsel were side-stepped. When Ms. Andrews applied for a pretrial conference to force Connie Reshard to discuss the taking of depositions of expert witness without applying for a court order under Rule 26(b)(4), Fed. R. Civ. P. and the subsequent series of events, she violated Rule 11, Fed. R. Civ. P. Plaintiffs-Appellants Motion for Sanctions under Rule 11 was required to be granted. The Supreme Court has made it clear that Rule 11 is mandatory and that no finding of bad faith is necessary. See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. ___, ____, 111 S.Ct. 922, 932, 112 L.Ed.2d 1140 (1991); Cooter and Gell v. Hartmarx Corp., 496 U. S. ___, ____, 110 S.Ct. 2447, 110 L.Ed.2d

359 (1990). The alleged finding that Connie Reshard waived her rights is erroneous in fact and law. Any statements said to be in support of that contention which are contained in the transcript of the June 29, 1990 proceeding before Magistrate Sherrill demonstrate the material alteration of a transcript by Paul Rayborn.[16] Thus, defendants were not entitled to obtain the depositions in violation of Rule 26(b)(4), which gave Plaintiffs the right to object and not attend the depositions of Dr. Taylor and Dr. Peniston.

Additionally, the District Court erred when it did not consider evidence in support of Dr. Robert Taylor's

---

[16] A court reporter's transcription under 28 U.S.C. § 753(b) is prima facie correct, but there is a rebuttal presumption. United States v. Smith, 453 F.2d 149 (5th Cir. 1970).

participation in this case as an expert. Thus, the factual findings on these issues with regard to Connie Reshard's testimony was clearly in error. App. at 89-90. Anderson v. City of Bessemer City, N.C., 470 U.S. 578, 105 S.Ct. 1504 (1985).[17] It did not consider the letter of transmittal which indicated that Dr. Taylor wrote a substantial set of opinions in the case on July 3, 1986.[18] This letter directly contradicts his sworn

---

[17] Connie Reshard has not reviewed her deposition since it was not signed in compliance with Rule 32(b) and (e), Fed.R.Civ.P. App. at 131.

[18] "Find enclosed a consultation on Minnie Reshard as you requested. As you will note, I have outline the major features of the case as I saw them. I have commented specifically on the interaction of the various and sundry drugs that were used in Mrs. Reshard's care as well as on the issue of the dissecting aorta aneurysm. As additional information becomes available in regard to Trazodone, I will forward it to your attention. Dr. Robert Taylor.

statement of July 17, 1990. Equally as important, that court declined the availability of in-cameral inspection of Appellants' work-product in open court on December 6, 1990. Provisions of well settled principles applicable to Rule 11, Fed R. Civ. P., are instructive. "The Rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified." 2A Moore's Federal Practice, paragraph 11.01[4].

The impact of the depositions with respect to Dr. Taylor is diminished by the fact that his testimony in most respects was unnecessary.[19] Together with medical

---

[19] Atkins v. Humes, 110 So.2d 663, 665-666 (Fla. 1959). The Florida Supreme Court stated: No medical expert

literature regarding the contraindicated administration of prolixin, pamelor, and desyrel, TCH's failure to move the decedent to TMRMC, and the facts of this case, including the gross negligence of the defendants in ignoring the decedent's clinical history of hypertension and clinical condition of severe chest pain presented, in favor of the treatment of undocumented mental claims, the Atkins principles are applicable here.

---

required "where want of skill or lack of care on the part of the physician or surgeon is so obvious . . . within the understanding of laymen and to necessitate only common knowledge and experience to judge it . . . Even in those cases in which some expert testimony may be required to show causation, the jurors may be authorized to infer from the circumstances that the defendant was negligent in the administration of . . . medical treatment, despite the absence of direct expert testimony to this effect and in the face of expert testimony to the contrary."

Under the facts, outright dismissal of the lawsuit is too severe a sanction if any sanction was required at all. Chambers v. NASCO, Inc., 111 S.Ct. 2123; Flaska v. Little Marine Constr. Co., 389 F.2d 885 (5th Cir. 1968), cert. denied, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed.2d 1387 (1968). All evidence relevant to the equity in the decision to dismiss a case must be considered. Instead, Appellees have benefited from their conduct without any admonishment or sanction for their wrongful conduct.

II. THE ORDER OF DISMISSAL IS NOT A FINAL ORDER WITHIN THE MEANING OF SECTION 1291 BECAUSE A MOTION FOR RECONSIDERATION TO THE MAGISTRATE JUDGE IS A RULE 59 (e) MOTION, WHICH HAD THE EFFECT OF STAYING THE APPEALS PROCESS TO THE DISTRICT JUDGE AND THE COURT OF APPEALS.

The order of dismissal was not a final order within the meaning of 28

U.S.C. § 1291. Once Petitioners (Plaintiffs) filed a timely Motion for Reconsideration on the merits of the December 14, 1990 Order, Report and Recommendation with the magistrate judge, the district judge could not act to dismiss the case prior to action by the magistrate judge on that motion. United States v. Reddick, 620 F.2d 606, 607 (7th Cir. 1980). The Seventh Circuit held that not only does 28 U.S.C.§ 636 (b)(1)(A)[20] require a party to seek intermediate review in a district court, but that a motion to reconsider a proceeding which reaches the merits of the litigation is a Rule 59(e) motion to amend which tolls the appeals process to the district judge. Id; See also Browder v.

---

[20] Rule 72, Fed.R.Civ.P. codifies the provisions of 28 U.S.C. § 636(b)(1)(A), (B), and (C). App. at .

Director Ill. Dept. of Corrections, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) (application of general rule between district court and court of appeals). The issues discussed in Section I, supra, support the Motion for Reconsideration, to correct errors of law, fact, and to present excluded evidence. See Keene Corp. v. Int'l. Fidelity Ins. Co., 561 F.Supp 656, 665 (D.C. Ill. 1982), aff'd.,unrep. 735 F.2d 1367 (7th Cir.? 1984), aff'd., 736 F.2d 388 (7th Cir. 1984).

Hence, the appeals process to the district judge was not commenced because of the motion to reconsider, then the judgment to dismiss this case with prejudice is not a final order or judgment. Accordingly, the court of appeals should have dismissed the case

under 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure.

The Seventh Circuit position in United States v. Reddick, is in conflict with the Eleventh Circuit disposition of this case. Here, Petitioners filed a timely Motion to Reconsider to the magistrate judge. App. at 14. The magistrate judge never ruled on the Motion. However, in an earlier hearing, the magistrate judge acknowledged that a Motion to rehear would be entertained after a ruling was made denying the Motion to Disqualify Defense Counsel and Default Judgment.[21]

---

[21] "**MAGISTRATE SHERRILL:** WHEN YOU FILE YOUR MOTION FOR REHEARING, YOU MUST GIVE A GOOD CAUSE FOR NOT PRESENTING ANY EVIDENCE THAT YOU PRESENTED TODAY. AND PLEASE DIRECT YOURSELF TO THAT WHEN YOU ASK FOR A REHEARING OF THE HEARING WE HAD TODAY." (Transcript of Motion to Disqualify Defense Counsel, April 12, 1990).

Here, The district judge treated the Motion to Reconsider as an objection by Petitioners, stating that such a motion for reconsideration was not contemplated by the Federal Rules of Civil Procedure. App. at 8. Clearly this position is not consistent judicial procedure. Petitioners filed objections. (R10-392 at 1-3). Technically, if the district judge can remove a motion to reconsider which is pending before a magistrate judge, when would the magistrate judge know that his jurisdiction over that matter has ended. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); United States v. Gargano, 826 F.2d 610 (7th Cir. 1987).[22]

---

[22] The magistrate judge ruled on nondispositive issues under Rule 72(A), Fed.R.Civ.P. and § 636(b)(1)(A). For example, defendant-respondent Moore's attorney, Jeannette Andrews failed to sign

This analysis is consistent with this court's holding in Buchanan v. Stanships Inc., 488 U.S. ____, 108 S.Ct. 1130, 99 L.Ed.ed 289 (1988)(collateral matter of attorney fees not a Rule 59(e) motion which tolls appeals process). Under the holding in United States v. Reddick, no final order was issued in the district court. This is grounds for reversible error.

This case has been wrongly decided and a writ of certiorari should be issued to correct this manifest injustice and to provide uniformity of decision in Federal courts.

---

her notice of taking of depositions under Rule 11 and Rule 26(g). The court ordered depositions were not self executing. In accordance with Rules 11 and 26, petitioners believed that attendance was not required